82-445

No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

HAIM MIZRAHI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review:

1. Was Mizrahi denied the effective assistance of counsel at trial when his counsel failed to object to the introduction into evidence of the most critical item of evidence offered by the government, namely, a "rap sheet" from the State of Israel, under circumstances where the government could not have obtained a conviction had the proper objections been interposed?

2. Was Mizrahi denied the effective assistance of counsel at trial in that his counsel failed to challenge, or in any way object to, the fact that Mizrahi was indicted under and convicted of violating a statute (18 U.S.C. §1425(a)) which did not, as a matter of law,

proscribe the conduct in which it was alleged Mizrahi had engaged?

PARTIES TO THIS PROCEEDING

The names of all parties to the proceeding in the Circuit Court whose judgment is sought to be reviewed are contained in the caption of this case.

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October Term, 1981

HAIM MIZRAHI,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE COURT OF APPEALS' DECISION

The opinion rendered by the Court of Appeals in this case was not published. A copy of the court's opinion is attached hereto as Appendix "A".

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals was filed on July 23, 1982.

No petition for rehearing was filed in the Court of Appeals. On August 19, 1982, upon motion of Mizrahi, the Court of Appeals stayed issuance of its mandate "pending the timely filing of a petition for certiorari with the United States Supreme Court and thereafter until the Supreme Court acts upon the petition."

28 U.S.C. §1254(1) confers in this Court jurisdiction to review the Court of Appeals judgment by a writ of certiorari.

RULES AND STATUTES INVOLVED IN THIS CASE

This case involves the following rules and statutes:

1. Rule 803(8) Fed. Rules Evidence.
2. 18 U.S.C. §1001.
3. 18 U.S.C. §1015.
4. 18 U.S.C. §1425(a).
5. 8 U.S.C. §1451(a) and (g).
6. 1940 Nationality Act, §338 (a)-(e).
7. 1940 Nationality Act, §346 (a).
8. 1906 Nationality Act, §15.
9. 1906 Nationality Act, §23.

The pertinent text of each rule and statute referred to above is set forth in Appendix "B" hereto.

STATEMENT OF THE CASE

On May 5, 1981, the grand jury returned an indictment charging Mizrahi with violating 18 U.S.C. §1425(a) (unlawfully procuring naturalization). The indictment alleged that Mizrahi knowingly procured naturalization contrary to law in that he stated that he had never been convicted either in or outside of the United States of any offense other than traffic violations, whereas in fact he had been convicted of various crimes in Israel.

On July 21, 1981, a trial by jury commenced. The trial continued until July 24, 1981, on which date the jury returned a verdict of guilty.

On September 21, 1981, the court committed Mizrahi to the custody of the Attorney General or his authorized

representative for a period of one year and one day and fined him $5,000.00. Execution of the term of imprisonment only was suspended, and Mizrahi was placed on probation for a period of three years. The court further ordered, as a condition of probation, that Mizrahi reside in a community treatment center for a period of six months. The court also ordered that Mizrahi's Certificate of Naturalization be cancelled pursuant to the provisions of 8 U.S.C. §1451(g).

Based on the allegations contained in the indictment, in order for the government to have obtained a conviction in this case, it was required to prove Mizrahi in fact sustained convictions in Israel. The record in this case reveals

that in its case-in-chief, the government sought to prove, and in fact proved, Mizrahi sustained convictions in Israel by introducing into evidence, in the absence of a defense objection, a document which can best be described as a "rap sheet" from the State of Israel (Government's Exhibit "1"), i.e., a document which listed convictions purportedly sustained by Mizrahi in Israel. It is defense counsel's failure to object to the introduction into evidence of this document on <u>any</u> ground which forms the basis of one aspect of Mizrahi's claim that he was denied the effective assistance of counsel.

As indicated above, Mizrahi was indicted under and convicted of violating 18 U.S.C. §1425(a). The gravamen of the indictment was that Mizrahi, in

obtaining naturalization, falsely represented that he had never been convicted of any offense in or outside of the United States. The legislative history of §1425(a) and its predecessor statutes reveals that it was never intended by Congress that a person could be prosecuted under §1425(a) for making a false statement in a naturalization proceeding which was not related to the statutory requirements for naturalization. Yet, this was precisely what occurred in the present case, without Mizrahi's trial counsel ever registering an objection to or challenging the prosecution under §1425(a). Counsel's failure to object to Mizrahi's being prosecuted under the wrong statute represents a second aspect of his ineffective assistance of counsel claim.

JURISDICTION IN THE COURT OF FIRST INSTANCE

The District Court had jurisdiction of this case under 18 U.S.C. §3231, and the Court of Appeals had jurisdiction under 28 U.S.C. §1291.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The writ in this case should be allowed because the Court of Appeals has incorrectly decided important questions of federal law which have not been, but should be, settled by this Court. Moreover, unless this Court reverses the decision of the Court of Appeals, Mizrahi will be deprived of his citizenship even though the Court of Appeals decision is patently erroneous. The following arguments are submitted in order to

amplify the reasons relied on for the allowance of the writ.

Mizrahi Was Denied the Effective Assistance of Counsel at Trial in That his Counsel Failed to Object to the Introduction into Evidence of the Israeli "Rap Sheet", Without Which the Government Could Not Have Obtained a Conviction.

As indicated above, in order to obtain a conviction in this case, based upon the allegations contained in the indictment, it was absolutely necessary that the government prove Mizrahi sustained convictions in Israel. The government sought to prove such convictions by introducing into evidence a "rap sheet" from the State of Israel, which purportedly listed convictions sustained by Mizrahi in Israel. This "rap sheet" was admitted into evidence because

Mizrahi's trial counsel made absolutely no objection to its introduction. It is submitted Mizrahi's trial counsel failed to render the assistance of counsel that was "within the range of competence demanded of attorneys in criminal cases" (**McMann v. Richardson**, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)) when he failed to object to the introduction into evidence of the single most important item of evidence presented by the government. Indeed, had counsel made the appropriate objections, Mizrahi would have been entitled to a judgment of acquittal at the conclusion of the government's case-in-chief. Counsel's ineffective assistance is particularly egregious in this case

since Mizrah's conviction led to the revocation of his citizenship.

The Israeli "Rap Sheet" Was Hearsay and No Exception to the Hearsay Rule Was Applicable.

There can be little doubt that the Israeli "rap sheet" was hearsay. Thus, the "rap sheet" was a document signed by someone named "Herstig" which was offered to prove the truth of the matter contained in the document, namely, that Mizrahi had sustained a number of convictions in Israel (Rule 801, Fed. Rules Ev.). It follows, therefore, that such document was inadmissible unless it could be brought within a recognized exception to the hearsay rule.

In the Court of Appeals the government argued only that the Israeli "rap sheet" would have been admissible, over

defense objection, pursuant to the provisions of Rule 803(8), Fed. Rules Ev. (the Public Records Exception). Contrary to the government's argument, it is clear the Israeli "rap sheet" would not have been admissible under Rule 803(8).

Rule 803(8), Fed. Rules Ev., creates a hearsay exception for public records and reports. (This rule is reproduced in Appendix "B" to this petition.) It is clear the Israeli "rap sheet," which merely lists convictions purportedly sustained by Mizrahi, does not qualify as a public record under Rule 803(8).

First, the "rap sheet" does not set forth the activities of any office or agency, and accordingly, it was not admissible under subparagraph (A) of §803(8). Similarly, it is nowhere

indicated on the "rap sheet," or anywhere else in the record, that the "rap sheet" "contains matters observed pursuant to duties imposed by law as to which matters there was a duty to report" (subparagraph (B). Moreover, it is submitted subparagraph (B) would not form a basis for admitting the "rap sheet" into evidence since that subparagraph expressly excludes from its operation documents containing "in criminal cases matters observed by police officers and other law enforcement personnel." Whatever else may be said of the Israeli "rap sheet," it is clear it emanated in some fashion from the Israel Police Department. 1/

1/ It is also submitted subparagraph (C) of §803(8) is inapplicable on its face since it applies only "in civil actions and proceedings and against the (continued)

The government was able to cite no reported case, and counsel for Mizrahi has been unable to discover one, in which a document such as a "rap sheet" was admitted into evidence in a criminal case, over a defense objection, to prove the defendant had sustained a conviction. Indeed, the cases indicated the "rap sheet" was inadmissible. See, e.g., **Prevost v. United States**, 149 F.2d 747 (9th Cir. 1945) (certified arrest card of defendant held to be hearsay and admission into evidence prejudicial); **Clainos v. United States**, 163 F.2d 593 (D.C. Cir. 1947) (picture of witness which was contained in police department files and which contained a series of notations on reverse side indicating the

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government in criminal cases." (Emphasis added.)

witness had been convicted of numerous crimes held to have been improperly admitted into evidence, the court stating:

> "Accusations of convictions for crime are serious, and a witness's denial should not be contradicted by anything less than a record authenticated by an official directly connected with the courts, within the 'business' of which the convictions occurred . . . ." (163 F.2d at p. 596));

United States v. Cox, 536 F.2d 65 (5th Cir. 1976) (trial court committed prejudicial and reversible error when it admitted into evidence the defendant's F.B.I. "rap sheet," the court stating:

> "In order properly to evidence appellant's admitted conviction for prostitution, the government should have obtained a certified copy of the judgment of conviction . . . ." (536 Fed.2d at p. 70 fn 11));

and **United States v. Scott**, 592 F.2d 1139, 1143 (10th Cir. 1979) (holding

that a "'rap sheet' is not admissible as public record of the conviction.")

It is absolutely clear that the Israeli "rap sheet" which was used by the government in this case to obtain Mizrahi's conviction would not have been admissible under Rule 803(8) had defense counsel interposed the appropriate hearsay objection. Indeed, as is indicated in the authorities cited above, the government was required to prove Mizrahi had sustained convictions in Israel by introducing court records of his conviction, not by a "rap sheet" emanating from the Israel Police Department. In fact, in **Lloyd v. American Export Lines, Inc.**, 580 F.2d 1179, 1190 (3rd Cir. 1978), the court specifically concluded that "admissibility of a party's conviction is governed by Rule 803(22) of the

Federal Rules of Evidence," [2] and "that only the judgment of conviction itself is admissible under Rule 803(22) . . . ." In light of the foregoing, had Mizrahi's trial counsel objected to the introduction into evidence of the Israeli "rap sheet" on the ground it was hearsay, the trial court would have been required to sustain the objection. Moreover, once the government was denied the use of the "rap sheet" to prove

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[2] Rule 803(22) of the Federal Rules of Evidence provides as follows: "Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere) adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused [are not excludable by the hearsay rule] . . . ."

Mizrahi's alleged convictions, the latter would have been entitled to a judgment of acquittal as a matter of law. It cannot be doubted, therefore, that trial counsel's failure to object to the introduction into evidence of the "rap sheet" severely prejudiced Mizrahi and, in fact, deprived Mizrahi of his Sixth Amendment right to confront the witnesses against him (i.e., the source of the information contained in the "rap sheet").

The somewhat astonishing feature of this case is that the Court of Appeals recognized that the ineffective assistance of counsel issues presented by Mizrahi in this case were significant ones. Thus, in its one-page Memorandum Opinion the court stated:

> "We need not reach the difficult substantive issues raised in

> support of Mizrahi's contention of ineffective assistance of counsel because, considering the developing nature of this area of the law, we do not feel that Mizrahi's counsel failed to exercise the skill, judgment and diligence of a reasonably competent attorney. (Citations omitted) . . . ."

With all due respect to the Court of Appeals, it is difficult to understand how it could conclude that Mizrahi's trial counsel was excused from making a rather elementary hearsay objection because of the "developing nature of this area of the law." Indeed, it would be surprising to present counsel for Mizrahi that any reasonably bright law school graduate would not recognize that an attempt by the government to introduce into evidence, as proof of a defendant's conviction, a "rap sheet" which emanated from a foreign police department presented substantial hearsay problems.

In sum, it is respectfully submitted that the Court of Appeals clearly erred when it concluded Mizrahi's trial counsel did not render ineffective assistance of counsel by failing to object on the ground of hearsay to the introduction into evidence of the Israeli "rap sheet." 3/

It is also submitted counsel rendered ineffective assistance when he failed to

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3/ There can be no doubt that defense counsel's failure to object to the introduction into evidence of the Israeli "rap sheet" on hearsay grounds did not constitute a tactical or strategic decision. Thus, in his declaration dated September 3, 1981, which was submitted in connection with Mizrahi's Motion for Continuance of Sentencing Hearing filed on September 4, 1981, Mizrahi's trial counsel (Theodore Flier) stated: ". . .I had no tactical or strategic motive in failing to object to the introduction into evidence of the police 'rap sheet' purporting to show that my client had been convicted of an offense in Israel."

object to the introduction into evidence of the "rap sheet" on the ground it was not properly authenticated under Rule 902(3) of the Federal Rules of Evidence. Specifically, the Israeli "rap sheet" does not purport to be signed by a person with authority and having an official capacity, as is required by Rule 902(3). Moreover, it does not appear that the Israeli "rap sheet" was certified in conformity with Rule 902(3). Specifically, the Israeli "rap sheet" does not appear to bear the seal of the Israel Police and its certification, by one "R. Sivan," fails to ascribe any official position or authority to the person whose signature appears on the Israeli "rap sheet" (Mr. Herstig), as is specifically required by Rule 902(3). Additionally, it should be noted that

the consular certification contains a disclaimer that "for the content of the annexed document the Embassy assumes no responsibility." For all of the reasons stated above, it is respectfully submitted that had counsel for Mizrahi objected to the introduction into evidence of the "rap sheet" on the ground it was not properly authenticated, that objection would have been granted and the government would have been denied the use of the "rap sheet" as part of its case-in-chief. By failing to object to the introduction into evidence of the "rap sheet" on the ground it was not properly authenticated, counsel for Mizrahi clearly failed to render assistance "within the range of competence demanded of attorneys in criminal cases." **McMann v. Richardson, supra.**

Mizrahi Was Denied the Effective Assistance of Counsel at Trial in that his Counsel Failed to Challenge, or in Any Way Object to, the Fact that Mizrahi Was Indicted Under and Convicted of Violating a Statute (18 U.S.C. §1425(a)) Which Did Not, as a Matter of Law, Proscribe the Conduct in Which It Was Alleged Mizrahi had Engaged.

18 U.S.C. §1425(a), the statute pursuant to which Mizrahi was indicted, provides as follows:

> "Whoever knowingly procures or attempts to procure, contrary to law, the naturalization of any person, or documentary or other evidence of naturalization or of citizenship. . .
>
> "Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

The provisions of both §1425(a) and Title 18 U.S.C. §1015(a) were originally contained in the Nationality Act of 1940 (54 Stat. 1163). (See Reviser's Notes to §§1425(a) and 1015(a).) Section 346 of the 1940 Act contained the penal provisions and provided, in part, as follows:

> "Sec. 346.(a) It is hereby made a felony for any alien or other person, whether an applicant for naturalization or citizenship, or otherwise, and whether an employee of the Government of the United States or not - (1) Knowingly to make a false statement under oath, either orally or in writing, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization or citizenship.
>
> "(2) Knowingly to procure or attempt to procure --
>
> "(a) The naturalization of any such person, contrary to the provisions of any law; or
> "(b) Documentary or other evidence of naturalization or of citizenship of any such

person, contrary to the provisions of any law. . . ."

As the Reviser's Notes indicate, subsection (a)(1) of §346 later became subparagraph (a) of §1015 and subsections (a)(2)-(5) later became §1425.

Since §1015(a), which prohibits making false statements in naturalization proceedings, and §1425(a), which prohibits procurement of naturalization "contrary to law," were both part of the same section of the 1940 Act and were clearly directed at different kinds of conduct, it is submitted the difference in conduct embraced by this statute was intended by Congress to continue after the penal provisions of the 1940 Act were separated. Indeed, if Congress intended §1425(a) to cover all situations in which naturalization was procured by the making of a false

statement, there would have been no need for §1015(a) to exist.

Section 1425(a), as indicated above, proscribes knowingly procuring naturalization "contrary to law." It is submitted an alien procures naturalization "contrary to law" only when he obtains naturalization without having complied with all of the statutory requirements to become a citizen. Thus, it may be that if an alien makes a statement in a naturalization proceeding which he knows is false and which is made for the purpose of circumventing the statutory requirements for naturalization, the alien may be prosecuted under §1425(a). If, however, the alien makes a false statement in a naturalization proceeding which is unrelated to the statutory requirements for naturalization, it is

submitted he may not be prosecuted under §1425(a) but, rather, must be prosecuted under §1015(a), or perhaps even under 18 U.S.C §1001. 4/

Counsel for Mizrahi has been unable to find any criminal case which interprets the term "contrary to law" as that term is used in §1425(a). Indeed, counsel has been unable to discover a reported case where a naturalized defendant has been convicted under §1425(a) for making a false statement in naturalization proceedings. There are, however, cases which deal with denaturalization proceedings which, it is submitted, provide support for Mizrahi's position that it is impermissible to prosecute a person under §1425(a) for making

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4/ Section 1001 is reproduced in Appendix B.

a false statement in a naturalization proceeding when the false statement does not directly relate to a statutory requirement for naturalization.

The denaturalization provisions of the 1940 Act were contained in §338(a). As can be seen from a review of §338(a), that section authorized a civil action for the revocation of a certificate of naturalization if the certificate was procured by fraud or if the certificate was "illegally procured." 8 U.S.C. §1451(a) contains the current grounds for revoking a certificate of naturalization. This section authorizes the revocation of a certificate if it was "illegally procured" or "procured by concealment of a material fact or by wilful misrepresentation." It is abundantly clear from a reading of the 1940

Act and present §1451(a) that Congress has for years intended to differentiate between a situation where naturalization was illegally procured vis a vis where naturalization was procured by fraud (the 1940 Act) or the concealment of a material fact or by wilful misrepresentation (§1451(a)). Stated another way, the history of the provisions of the law relating to denaturalization makes it crystal clear that the illegal procurement of naturalization was considered to be entirely different from procuring naturalization by making a false statement. This conclusion is also supported by the authorities discussed below.

In **United States v. Ginsberg**, 243 U.S. 472, 475, 37 S.Ct. 422, 425, 61 L.Ed. 853 (1916), the court stated:

> "No alien has the slightest right to naturalization unless all

> statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the Government may challenge it as provided in §15 [of the 1906 Act] and demand its cancellation unless issued in accordance with such requirements. If procured when prescribed qualifications have no existence in fact, it is illegally procured; . . ."

See also **Maney v. United States**, 278 U.S. 17, 49 S.Ct. 15, 73 L.Ed. 156 (1928), and **United States v. Kahn**, 1 F.2d 1006, 1007 (D.C. Mass. 1924).

United States v. Kusche, 56 F.Supp. 201 (C.D. Cal. 1941), contains an in-depth discussion of the differences between procuring naturalization "illegally" and by fraud under the denaturalization sections of the 1906 Act (23 Stat. 603).

It is absolutely clear from the authorities discussed above that the term

"illegally procured" as used in the statutes relating to denaturalization means "contrary to law," i.e., embraces a situation where naturalization has been procured without satisfaction of the statutory requirements. The term "illegally procured" as used in the denaturalization statutes was not intended to include a situation where naturalization was obtained by making a false statement, unless the false statement related directly to the statutory requirements for naturalization. This conclusion is buttressed by the decision in **United States v. Kusche, supra**, at p. 228.

To repeat, based upon the authorities referred to above, it is submitted that the term "contrary to law," as used in the law relating to the naturalization

of aliens, has a definite meaning. Specifically, this term means that naturalization was procured without the alien satisfying all of the statutory requirements for naturalization. The term "contrary to law" has never been intended to embrace the situation where an alien made a false statement in a naturalization proceeding and later procured naturalization, unless the false statement went directly to a statutory requirement for naturalization.

Although the authorities cited above were cases involving the interpretation of the phrase "illegally procured" in the setting of denaturalization proceedings, it cannot be rationally argued that the term "contrary to law," as used in §1425(a), the section pursuant to which Mizrahi was indicted, has a

different meaning. It follows, therefore, that no person may be indicted under §1425(a) for procuring naturalization "contrary to law" when the act engaged in by the person was making a false statement in a naturalization proceeding which did not directly relate to the statutory requirements for naturalization. Only this interpretation has the effect of recognizing the difference between §1425(a) and §1015(a), i.e., the difference between procuring naturalization illegally (contrary to law) and making false statements in a naturalization proceeding.

In the present case, as indicated, Mizrahi was indicted under §1425(a) for having falsely stated that he had never sustained any convictions in or outside of the United States, except for some

traffic violations. Mizrahi was impermissibly prosecuted under §1425(a) if it was not a statutory requirement for naturalization that he had never previously sustained a criminal conviction.

Title 8 U.S.C. §1421 et seq. sets forth the statutory requirements relating to naturalization. Simply stated, it is nowhere provided in these sections that it is a requirement of naturalization that an alien not have any record of previous criminal convictions. Accordingly, since the alleged false statement made by Mizrahi in this case did not go directly to one of the statutory requirements of naturalization, it is submitted his naturalization was not procured "contrary to law," as that term is used in §1425(a), and his prosecution under that section was not proper.

As indicated above, Mizrahi respectfully submits that he was impermissibly prosecuted under §1425(a). Since Mizrahi's counsel at no time objected to or challenged the prosecution under §1425(a), it is respectfully submitted counsel failed to afford the effective assitance of counsel guaranteed by the Sixth Amendment. **McMann v. Richardson, supra.**

Further, it is clear counsel's error prejudiced Mizrahi. Thus, it must be noted that the indictment returned against Mizrahi alleged that he engaged in the conduct described in the indictment in 1974. The indictment in this case was returned against Mizrahi in May 1981. Since 18 U.S.C. §3291 provides for a ten-year statute of limitations for prosecutions under §1425(a), it is

clear the indictment returned against Mizrahi did not violate the statute of limitations. If, however, counsel for Mizrahi had made the appropriate objections and challenge to the prosecution under §1425(a), Mizrahi could not have been prosecuted under either 18 U.S.C. §1001 or §1005, since prosecutions under both of these sections are subject to the general five-year statute of limitations (18 U.S.C. §3282).

CONCLUSION

For any or all of the foregoing reasons, petitioner submits that a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

HARVEY A. SCHNEIDER

Attorney for Petitioner

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

HAIM MIZRAHI,

Defendant-Appellant.

F I L E D: July 23, 1982

Phillip B. Winberry
Clerk, U.S.Court of a Appeals

Nos. 81-1586 and 82-5301
D.C. Nos. 81-483-TJH
and 82-523-TJH

M E M O R A N D U M

On Appeal from the United States
District Court for the Central
District of California
The Honorable Terry J. Hatter, Jr.,
District Judge Presiding

Argued and Submitted June 9, 1982

Before: ANDERSON, FERGUSON and NELSON,

Circuit Judges.

The primary issue raised in both the direct appeal and in Mizrahi's appeal from the denial of his 28 U.S.C. §2255 motion to vacate, set aside or correct his sentence is whether Mizrahi's trial counsel rendered ineffective assistance of counsel by not objecting during trial to the introduction of an Israeli "rap sheet," purporting to list Mizrahi's Israeli conviction record.

We need not reach the difficult substantive issues raised in support of Mizrahi's contention of ineffective assistance of counsel because, considering the developing nature of this area of the law, we do not feel that Mizrahi's counsel failed to exercise the skill, judgment, and diligence of a reasonably competent attorney. See Cooper v, Fitzharris, 586 F.2d 1325,

1329-30 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974, 99 S.Ct. 1542, 59 L.Ed.2d 793 (1979). See also, United States v. Regner, 677 F.2d 754 (9th Cir. 1982). We have considered Mizrahi's other contentions and find them to be without merit.

Mizrahi's conviction and the denial of his §2255 motion are therefore

AFFIRMED.

Federal Rules of Evidence, Rule 803:

The following are not excluded by the hearsay rule even though the declarant is available as a witness:

* * *

"(8) **Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by

law, unless the sources of information or other circumstances indicate lack of trustworthiness."

18 U.S.C. §1001.

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

18 U.S.C. §1015.

"(a) Whoever knowingly makes any false statement under oath, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization, citizenship, or registry of aliens; or

"(b) Whoever knowingly, with intent to avoid any duty or liability imposed or required by law, denies that he has been naturalized or admitted to be a citizen, after having been so naturalized or admitted; or

"(c) Whoever uses or attempts to use any certificate of arrival, declaration of intention, certificate of naturalization, certificate of citizenship or other documentary evidence of naturalization or of citizenship, or any

duplicate or copy thereof, knowing the same to have been procured by fraud or false evidence or without required appearance or hearing of the applicant in court or otherwise unlawfully obtained; or

"(d) Whoever knowingly makes any false certificate, acknowledgment or statement concerning the appearance before him or the taking of an oath or affirmation or the signature, attestation or execution by any person with respect to any application, declaration, petition, affidavit, deposition, certificate of naturalization, certificate of citizenship or other paper or writing required or authorized by the laws relating to immigration, naturalization, citizenship, or registry of aliens--

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

18 U.S.C. §1425.

"(a) Whoever knowingly procures or attempts to procure, contrary to law, the naturalization of any person, or documentary or other evidence of naturalization or of citizenship; or

"(b) Whoever, whether for himself or another person not entitled thereto, knowingly issues, procures or obtains or applies for or otherwise attempts to procure or obtain naturalization, or citizenship, or a declaration of intention to become a citizen, or a certificate of arrival or any certificate or evidence of naturalization or citizenship, documentary or otherwise, or

duplicates or copies of any of the foregoing--

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

8 U.S.C. §1451.

"(a) It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 1421 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such

order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: Provided, That refusal on the part of a naturalized citizen within a period of ten years following his naturalization to testify as a witness in any proceeding before a congressional committee concerning his subversive activities, in a case where such person has been convicted of contempt for such refusal, shall be held to constitute a ground for

revocation of such person's naturalization under this subsection as having been procured by concealment of a material fact or by willful misrepresentation. If the naturalized citizen does not reside in any judicial district in the United States at the time of bringing such suit, the proceedings may be instituted in the United States District Court for the District of Columbia or in the United States district court in the judicial district in which such person last had his residence."

* * *

"(g) When a person shall be convicted under section 1425 of Title 18 of knowingly procuring naturalization in violation of law, the court in which such conviction is had shall thereupon revoke, set aside, and declare void the

final order admitting such person to citizenship, and shall declare the certificate of naturalization of such person to be canceled. Jurisdiction is conferred on the courts having jurisdiction of the trial of such offense to make such adjudication."

1940 Nationality Act, §338

"Sec. 338. (a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 301 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and

canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.

"(b) The party to whom was granted the naturalization alleged to have been fraudulently or illegally procured shall, in any such proceedings under subsection (a) of this section, have sixty days' personal notice in which to make answer to the petition of the United States; and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees

by the laws of the State or the place where such suit is brought.

"(c) If a person who shall have been naturalized shall, within five years after such naturalization, return to the country of such person's nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention on the part of such person to become a permanent citizen of the United States at the time of filing such person's petition for naturalization, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the revocation and setting aside of the order admitting such person to citizenship and the cancelation of the certificate of naturalization as having been

obtained through fraud. The diplomatic and consular officers of the United States in foreign countries shall from time to time, through the Department of State, furnish the Department of Justice with the names of those persons within their respective jurisdictions who have been so naturalized and who have taken permanent residence in the country of their nativity, or in any other foreign country, and such statements, duly certified, shall be admissible in evidence in all courts in proceedings to revoke and set aside the order admitting to citizenship and to cancel the certificate of naturalization.

"(d) The revocation and setting aside of the order admitting any person to citizenship and canceling his certificate of naturalization under the

provisions of subsection (a) of section 338 shall not, where such action takes place after the effective date of this Act, result in the loss of citizenship or any right or privilege of citizenship which would have been derived by or available to a wife or minor child of the naturalized person had such naturalization not been revoked, but the citizenship and any such right or privilege of such wife or minor child shall be deemed valid to the extent that it shall not be affected by such revocation: Provided, That this subsection shall not apply in any case where the revocation and setting aside of the order was the result of actual fraud.

"(e) When a person shall be convicted under this Act of knowingly procuring naturalization in violation of

law, the court in which such conviction is had shall thereupon revoke, set aside, and declare void the final order admitting such person to citizenship, and shall declare the certificate of naturalization of such person to be canceled. Jurisdiction is hereby conferred on the courts having jurisdiction of the trial of such offense to make such adjudication."

1940 Nationaltiy Act, §346(a)

"Sec. 346. (a) It is hereby made a felony for any alien or other person, whether an applicant for naturalization or citizenship, or otherwise, and whether an employee of the Government of the United States or not--

"(1) Knowingly to make a false statement under oath, either orally or

in writing, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization or citizenship.

"(2) Knowingly to procure or attempt to procure--

"a. The naturalization of any such person, contrary to the provisions of any law; or

"b. Documentary or other evidence of naturalization or of citizenship of any such person, contrary to the provisions of any law."

1906 Nationality Act, §15

"Sec. 15. That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to

institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. In any such proceedings the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured shall have sixty days personal notice in which to make answer to the petition of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the

manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought."

1906 Nationality Act, §23

"Sec. 23. That any person who knowingly procures naturalization in violation of the provisions of this Act shall be fined not more than five thousand dollars, or shall be imprisoned not more than five years, or both, and upon conviction the court in which such conviction is had shall thereupon adjudge and declare the final order admitting such person to citizenship void. Jurisdiction is hereby conferred on the courts having jurisdiction of the trial of such offense to make such adjudication. Any person who knowingly aids, advises, or

encourages any person not entitled thereto to apply for or to secure naturalization, or to file the preliminary papers declaring an intent to become a citizen of the United States, or who in any naturalization proceeding knowingly procures or gives false testimony as to any material fact, or who knowingly makes an affidavit false as to any material fact required to be proved in such proceeding, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both."

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No. 82-445

In the Supreme Court of the United States

OCTOBER TERM, 1982

HAIM MIZRAHI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the petitioner was denied the effective assistance of counsel at trial.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-3) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1982 (Pet. App. A-1). The petition for a writ of certiorari was filed on September 15, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted of procuring naturalization contrary to law, in violation of 18 U.S.C. 1425(a). He was sentenced to a term of imprisonment for a year and a day, all but six months of

which was suspended, fined $5,000, and placed on probation for three years (Tr. 615-616). In addition, petitioner's citizenship was revoked (Tr. 615, 619). The court of appeals affirmed (Pet. App. A-1 to A-3).

1. Petitioner was born on July 12, 1930, in Tel Aviv, Israel, of parents who were not United States citizens (Exh. 3). While living there, petitioner was convicted eight times by Israeli courts of criminal offenses, including assault and theft, between 1945 and 1965 (Exh. 1). Petitioner entered the United States on July 4, 1967 as a visitor for pleasure; he subsequently became a permanent resident alien and then a citizen (Exhs. 3 and 4).

As the trial evidence showed, in the course of changing his status to that of a permanent resident and later in becoming a citizen, petitioner falsely denied four times under oath that he had a criminal record. Thus, petitioner indicated on his application to adjust his status to that of a permanent resident alien, which was sworn and signed April 8, 1968, that he had not been charged with a violation of law other than minor traffic violations (Tr. 188; Exh. 3). Petitioner subsequently swore to the accuracy of this application in his June 17, 1968 interview before an immigration examiner (Tr. 178, 185, 188, 197). Several years later, after being granted permanent resident status, petitioner filed an Application to File Petition for Naturalization on January 15, 1974 (Exh. 4). In that application, petitioner swore, first, that he had not "knowingly committed any crime" for which he had not been arrested and, second, that he had not "been arrested, charged, indicted, convicted, fined or imprisoned for breaking or violating any law or ordinance, including traffic regulations," although he did list four traffic citations (Tr. 238-240; Exh. 4). During a sworn interview concerning the application, the interviewer changed the answer to the second part of the question to "Yes" in view of petitioner's admission of the traffic offenses. However, the

interviewer noted that after further questioning, petitioner said he had not been arrested for any other offenses (Tr. 237, 239-240, 295).

In order to establish petitioner's criminal history, the government introduced at trial a document containing a list of the final convictions, the Israeli court in which petitioner was convicted, and the date of trial and nature of sentence in each of eight cases from July 27, 1945 through July 9, 1965 (Exh. 1). Captioned "Headquarters, Interpol, Criminal Intelligence Division," the document was certified by an official of the Israeli Department of Automatic Data Processing to be the final convictions on petitioner's criminal record number 5906/45. Attached to the list of convictions was a photographic copy of fingerprints similarly certified to be the fingerprints of the person with criminal record number 5906/45. The list of convictions was further certified under seal by R. Sivan, Director of the Consular Division of the Israeli Ministry of Foreign Affairs, whose signature and seal were, in turn, certified by Susan S. Jacobs, United States Consul for the Consular District of Tel Aviv/-Jaffa, Israel.

INS Investigator Nowlon testified that he had received these documents as a result of a request to the Israeli National Police made through INS' Interpol liaison officer. He also testified that he took petitioner's fingerprints on February 4, 1981 (Tr. 153). A subsequent comparison of the fingerprints taken by Nowlon and the fingerprints received from Israel established that the two sets of fingerprints belonged to the same person (Tr. 154-155, 172). The fingerprints and record of convictions were admitted into evidence without objection by petitioner's counsel (Tr. 172).

With the exception of the 1954 conviction for theft, petitioner admitted at trial the accuracy of the record of convictions (Tr. 419-422, 429). He maintained, however,

that he did not understand English well and that he misunderstood the questions posed to him orally and in writing concerning his criminal history. In particular, petitioner testified that he thought the criminal history questions referred only to whether he had ever been "arrested" for an offense, and that he had only been sent letters to appear in court and had not been "arrested" before 1974 (Tr. 406-407, 410, 415-421).

ARGUMENT

Petitioner contends that he was denied effective assistance of counsel because his attorney failed to object to the admission of the Israeli record of his convictions and failed to object to the prosecution of petitioner under 18 U.S.C. 1425(a). These claims of ineffective assistance of counsel, based on the particular facts of this case, do not warrant review by this Court. The court of appeals applied an appropriate standard for review of ineffective assistance of counsel claims and correctly concluded that there is no indication that petitioner's counsel "failed to exercise the skill, judgment, and diligence of a reasonably competent attorney" (Pet. App. A-2).

1. The document listing petitioner's prior convictions in Israel constituted a "public record [or] report" within the meaning of Fed. R. Evid. 803(8), and further met the authentication requirements for a foreign public document under Fed. R. Evid. 901 and 902(3). Contrary to petitioner's contention (Pet. 9-23), the record therefore clearly was admissible at trial. Accordingly, counsel cannot be thought to have been ineffective in failing to object to its admission. But even if the issue were fairly debatable, counsel, at the very least, reasonably could have concluded that the trial court would have admitted the record of convictions even if

he had objected,[1] or that, if the trial court did not do so, the government would have offered other evidence to establish the existence and validity of the criminal records.

As this Court said in *McMann* v. *Richardson*, 397 U.S. 759, 770 (1970), in assessing the competency of counsel who advised the defendant to plead guilty rather than challenge the admissibility of an allegedly coerced confession:

> Courts continue to have serious differences among themselves on the admissibility of evidence, both with respect to the proper standard by which the facts are to be judged and with respect to the application of that standard to particular facts. That this Court might hold a defendant's confession inadmissible in evidence, possibly by a divided vote, hardly justifies a conclusion that the defendant's attorney was incompetent or ineffective when he thought the admissibility of the confession sufficiently probable to advise a plea of guilty.

See also *Engle* v. *Isaac*, No. 80-1430 (Apr. 5, 1982), slip op. 25. So here, the decision not to challenge the admissibility of the record of convictions — all but one of which petitioner admitted at trial in any event — but rather to offer a defense that petitioner did not understand the meaning

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[1] Petitioner erroneously refers to the Israeli record of convictions as a "rap sheet," and then cites cases involving rap sheets to support his claim that the instant document should not have been admitted (Pet. 14-15). The record of convictions, while maintained by the Israeli National Police, is far different from a "rap sheet." It is a record *only* of convictions, not of charges and arrests. It is made as the official Israeli record of convictions and is admissible under Section 170 of the Israeli Criminal Procedure Law as prima facie evidence of previous convictions. The document, fully authenticated as required by the Rules of Evidence, therefore was admissible in this case. See *United States* v. *Regner*, 677 F. 2d 754, 758-759 (9th Cir. 1982); *United States* v. *Leal*, 509 F. 2d 122, 125-128 (9th Cir. 1975); *Lloyd* v. *American Export Lines, Inc.*, 580 F. 2d 1179, 1187-1190 (3d Cir.), cert. denied, 439 U.S. 969 (1978).

of questions concerning his criminal history, constituted "advice * * * within the range of competence demanded of attorneys in criminal cases." *McMann* v. *Richardson, supra*, 397 U.S. at 771, 774. Under no reasonable view can it be said to involve "serious derelictions" on the part of counsel (*ibid.*).

2. The court of appeals also correctly rejected petitioner's contention (Pet. 23-36) that trial counsel's assistance was constitutionally inadequate because he failed to object to the prosecution of petitioner under 18 U.S.C. 1425(a), which makes criminal the procurement of naturalization "contrary to law." Petitioner contends that his making of a false statement on his Application to File Petition for Naturalization could have been prosecuted only under 18 U.S.C. 1015(a), which prohibits the making of a false statement under oath in any matter relating to naturalization, citizenship, or registration of aliens, or possibly under 18 U.S.C. 1001, the general false statement statute. As this Court has made clear, however, where there is an overlap in the coverage of two criminal statues, the government may prosecute under either. *United States* v. *Batchelder*, 442 U.S. 114 (1979).

We agree with petitioner that the making of the concededly false statements in connection with his naturalization was prohibited by 18 U.S.C. 1015(a). But this does not mean that his conduct in this case was not also reached by 18 U.S.C. 1425(a). Petitioner did more in this case than make a false statement; he obtained his citizenship as a result. Because he procured naturalization through the making of a false statement that in itself constituted a criminal violation and was therefore contrary to law, he procured his naturalization "contrary to law" within the meaning of 18 U.S.C. 1425(a). See *United States* v. *Bruno*, 25 F. Supp. 793, 794 (D.N.J. 1938). Cf. *Fedorenko* v. *United States*, 449 U.S. 490, 514-515 (1981); *Baumgartner* v. *United States*, 322 U.S. 665, 675 (1944).

Petitioner concedes (Pet. 26, 31) that the obtaining of naturalization through the making of a false statement in connection with an application for naturalization would be prohibited by 18 U.S.C. 1425(a) as "contrary to law" if the false statement related to one of the statutory criteria for naturalization; but he contends that the false statement here does not fall in that category. Petitioner is wrong. Under 8 U.S.C. 1427(a) and 1429, an applicant for citizenship must have been lawfully admitted for permanent residence. *Fedorenko* v. *United States, supra*, 449 U.S. at 514-515. The commission of crimes involving moral turpitude renders an alien ineligible to receive an immigrant visa, 8 U.S.C. 1182(a)(9), and therefore to attain the status of an alien lawfully admitted for permanent residence, 8 U.S.C. 1255(a). The false information on the Application regarding petitioner's convictions in Israel therefore was material to the consideration by the INS and the court of his application for naturalization.[2] Moreover, 8 U.S.C. 1427(a)(3) requires that an applicant for naturalization be a person of good moral character, and 8 U.S.C. 1101(f)(6) precludes such a finding for one who has given false testimony for the purpose of obtaining benefits under the Act, as petitioner did both in his Application to File Petition for Naturalization and in his application for permanent resident status.

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[2]The Attorney General is directed by 8 U.S.C. 1446 to conduct an investigation of the person petitioning for naturalization, including a personal examination of the person to determine his eligibility for citizenship, and to submit a recommendation to the naturalization court. The Attorney General also is authorized to promulgate regulations and prescribe forms for this purpose. 8 U.S.C. 1443(a) and (c). The Application to File Petition for Naturalization (Form N-400), involved in this case (Exh. 3), is prescribed by regulation pursuant to this authority, 8 C.F.R. 332a.2, and the material on that Application furnishes the basis for the examination of the person by INS to determine his eligibility for citizenship. 8 C.F.R. 332.11(b). Thus, in failing to answer the question truthfully, petitioner did not comply with the regulatory procedures established pursuant to statute as a prelude to naturalization.

In any event, petitioner acknowledges that he can point to no decision of this Court or any other court holding that the conduct at issue here was not subject to prosecution under 18 U.S.C. 1425(a). At the very least, then, the failure of the attorney who represented him at trial to identify the novel statutory construction urged by petitioner here cannot be thought to have departed so substantially from the range of competence ordinarily expected of an attorney in a criminal case as to render the attorney's performance constitutionally inadequate under the Sixth Amendment. *McMann* v. *Richardson, supra*, 397 U.S. at 771, 774; *Tollett* v. *Henderson*, 411 U.S. 258, 266 (1973); see also *Engle* v. *Isaac, supra*, slip op. 25.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

D. LOWELL JENSEN
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KAREN I. SKRIVSETH
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NOVEMBER 1982

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No. 82-445

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

HAIM MIZRAHI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner's Reply to Brief in Opposition to Petition for Writ of Certiorari (hereinafter "Reply") was forwarded to the Court for filing on or about December 14, 1982. A copy of the Reply is attached hereto. However, since this Court's order denying the Petition for

Writ of Certiorari was issued on December 13, 1982, the Reply was not filed but was returned to counsel for petitioner. Based on these facts, it seems too clear to doubt that the Reply and the Court's order crossed in the mail. It is also too clear to doubt that the Court's order denying the petition was made without considering the Reply and the appendix thereto.

In his Reply, petitioner pointed out that on December 2, 1982 the same panel of the United States Court of Appeals for the Ninth Circuit that decided his appeal issued its opinion in the case of United States v. Yitchak Ijo Perlmuter, No. 81-1533. A review of the court's opinion in Perlmuter (a copy of which is attached as Appendix "A" to the Reply) reveals that Perlmuter's conviction was reversed on the ground that the documents which reportedly

contained convictions sustained by Perlmuter in Israel were improperly admitted into evidence. Specifically, the Court of Appeals held that the documents were hearsay (and no exception to the hearsay rule was applicable) and that the documents were not properly authenticated. It will be recalled that these are the very objections petitioner claims should have been made by his trial counsel to the identical documents which were offered by the government at his trial.

Petitioner submits that the decision in Perlmuter established beyond doubt that petitioner was denied the effective assistance of counsel at his trial. Specifically, as was stated in the Reply:

> "In sum, the state of affairs which is present with respect to the present case and the Perlmuter case is as follows: Petitioner Mizrahi has been sentenced to prison, fined and

> deprived of his citizenship because his trial attorney failed to make basic hearsay and lack of authentication objections to the admissibility of the single most important item of evidence offered by the government -- the Israeli 'rap sheet' -- without which there could have been no conviction. On the other hand, Perlmuter remains free, with his citizenship intact, because his trial attorney did make the appropriate objections. Simply stated, it would be difficult to imagine facts which more clearly indicate that a defendant in a criminal case was denied the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution." (Reply, at pp. 4-5)

Based on the foregoing, it is respectfully submitted it was imperative that this Court have before it the Reply, with the attached opinion in Perlmuter, supra, before ruling on petitioner's Petition for Writ of Certiorari. Because it is clear the Perlmuter opinion was not

before the Court at the time the Petition for Writ of Certiorari was ruled upon, it is further submitted the Court should reconsider its ruling on the petition in light of that opinion.

WHEREFORE, it is respectfully prayed that this Petition for Rehearing be granted.

Dated: December 20, 1982

Harvey A. Schneider
HARVEY A. SCHNEIDER
Attorney for Petitioner

CERTIFICATION OF COUNSEL

The undersigned, being counsel for petitioner Haim Mizrahi, hereby certifies that this Petition is presented in good faith and not for delay. This Petition has been filed on the ground of intervening circumstances of substantial or controlling effect, namely, that the Court's order denying the Petition for Writ of Certiorari was issued without considering Petitioner's Reply to Brief in Opposition to Retition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and the appendix thereto. This Petition is restricted to the ground set forth above.

Harvey A. Schneider

HARVEY A. SCHNEIDER
Attorney for Petitioner

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

Carolyn Kassian, being first duly sworn, deposes and says: I am a citizen of the United States and a resident of the county aforesaid. I am over the age of 18 years and not a party to the within entitled action. My business address is 924 Westwood Boulevard, Suite 400, Los Angeles, CA 90024. On December 27, 1982 I served the within Petition for Rehearing of Order Denying Petition for Writ of Certiorari on the respondent in said action by placing a true copy thereof enclosed in a sealed envelope with priority postage thereon fully prepaid, in the United States mail at Los Angeles, California, the envelope addressed as

follows:

Solicitor General
U.S. Department of Justice
10th & Constitution Avenues
Washington, D.C. 20530

Mark H. Bonner
Assistant U.S. Attorney
312 North Spring Street
Los Angeles, CA 90012

Affiant makes this service for Harvey A. Schneider, Attorney for Haim Mizrahi, Petitioner herein. There is delivery service by United States mail at the places so addressed or there is regular communication by mail between the place of mailing and the places so addressed.

All parties required to be served in this matter have been served, as indicated above. (Rule 28.5)

Carolyn Kassian
CAROLYN KASSIAN

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

On December 27, 1982, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Carolyn Kassian, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

/s/ GAYLE R. STEINMETZ
Notary Public in and for
said County and State

No. 82-445

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

HAIM MIZRAHI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the Petition for Writ of Certiorari filed in this case, petitioner Haim Mizrahi contended, and still contends, that he was denied the effective assistance of counsel at trial in that his

counsel failed to object to the introduction into evidence of an Israeli "rap sheet," without which the government could not have obtained a conviction. In his petition Mizrahi pointed out that the "rap sheet" was inadmissible hearsay and was not properly authenticated. Finally, in his petition Mizrahi indicated that the Court of Appeals upheld his conviction in a one-page Memorandum Opinion in which the court stated:

> "We need not reach the difficult substantive issues raised in support of Mizrahi's contention of ineffective assistance of counsel because, considering the developing nature of this area of the law, we do not feel that Mizrahi's counsel failed to exercise the skill, judgment and diligence of a reasonably competent attorney. (Citations omitted). . . ."

On December 2, 1982, the United States Court of Appeals for the Ninth

Circuit (indeed, the very panel which decided Mizrahi's case) issued its opinion in the case of **United States v. Yitchak Ijo Perlmuter**, No. 81-1533. A copy of the court's opinion in **Perlmuter** is attached hereto as Appendix "A." As can be readily seen from a review of the decision in **Perlmuter**, the court reversed Perlmuter's conviction on the ground that the documents which purportedly contained convictions sustained by Perlmuter in Israel were improperly admitted into evidence. Specifically, the Court of Appeals held that the documents were hearsay (and no exception to the hearsay rule was applicable) and that the documents were not properly authenticated. It will be recalled that these are the ver objections Mizrahi claims should have been made by his trial counsel to

the identical documents which were offered by the government at his trial.

In sum, the state of affairs which is present with respect to the present case and the Perlmuter case is as follows: Petitioner Mizrahi has been sentenced to prison, fined and deprived of his citizenship because his trial attorney failed to make basic hearsay and lack of authentication objections to the admissibility of the single most important item of evidence offered by the government -- the Israeli "rap sheet" -- without which there could have been no conviction. On the other hand, Perlmuter remains free, with his citizenship intact, because his trial attorney did make the appropriate objections. Simply stated, it would be difficult to imagine facts which more clearly indicate that a

defendant in a criminal case was denied the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution.

CONCLUSION

For the reasons set forth above, and in Mizrahi's Petition for Writ of Certiorari, it is submitted a Writ of Certiorari should issue to review the decision of the United States Court of Appeals for the Ninth Circuit.

Dated: December 10, 1982.

Respectfully submitted,

HARVEY A. SCHNEIDER

Attorney for Petitioner

APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

YITCHAK IJO PERLMUTER,

Defendant-Appellant.

No. 81-1533X
D.C. No. CR-81-482-1-IH
Filed: December 2, 1982
Phillip B. Winberry
Clerk, Court of Appeals

OPINION

Appeal from the United States
District Court for the Central
District of California
Irving Hill, District Judge, Presiding
Argued and Submitted
June 9, 1982

Before: ANDERSON, FERGUSON, NELSON,
Circuit Judges
NELSON, Circuit Judge:

After a court trial, appellant was found guilty of knowingly procuring

naturalization contrary to law in violation of 18 U.S.C. § 1425(a) (1976). The indictment alleged that appellant misstated orally and on his Application to File Petition for Naturalization, that he had not been convicted of any offenses other than traffic violations. An exhibit (Exhibit 4) was admitted into evidence, however, which indicated that appellant had been convicted of a number of offenses in Israel including (among others) perjury, assault, theft, and obtaining goods by false pretenses. Appellant was fined $5000 and sentenced to six months in prison. The trial court also cancelled appellant's certificate of naturalization pursuant to 8 U.S.C. § 1451(g) (1976). Perlmuter appeals from the conviction and the cancellation of his certificate claiming

that two exhibits (Exhibits 3 and 4) should not have been received into evidence. He contends that neither exhibit was properly authenticated, and that Exhibit 4 was inadmissible hearsay, received into evidence in violation of the Federal Rules of Evidence ("FRE") and the confrontation clause. We reverse.

I. FACTS

Appellant immigrated to the United States from Israel and was granted lawful permanent residence in 1968. In 1974 appellant was granted naturalization and became a United States citizen.

Gregory Ball, an examiner for the Immigration and Naturalization Service ("INS"), testified that he conducted the preliminary investigation of appellant's application for citizenship. Mr. Ball

stated that if appellant had revealed any convictions, Ball would have requested a further investigation concerning appellant's good moral character before making a recommendation on appellant's application for citizenship.

Harold Nowlan, an investigator with the INS testified that he contacted an immigration investigator in Washington, D.C. who served as liaison to Interpol, and requested a certified copy of any criminal record for appellant held by the Israeli National Police. He received a document, identified as Exhibit 4, which purports to list four convictions suffered by appellant in Israel between 1955 and 1964. He also received an identification form, marked as Exhibit 3, which purports to contain the fingerprints of the person whose

criminal record is shown in Exhibit 4. These fingerprints, it is stipulated, matched appellant's.

Appellant claims that neither Exhibit 3 nor Exhibit 4 was properly authenticated according to the FRE. He also claims that Exhibit 4 should have been excluded from evidence as hearsay not falling within any recognized exception. Finally, appellant contends that the admission of Exhibit 4 violated his sixth amendment right to confrontation of the witnesses against him.

II. AUTHENTICITY

It appears that the trial court decided that Exhibits 3 and 4 were authentic, based only on the documents' "aura of authenticity" and not on compliance with the FRE. The standard of review of a district court's decision

regarding authenticity of evidence is the abuse of discretion standard. **United States v. Cox**, 633 F.2d 871, 874 (9th Cir. 1980), cert. denied 102 S.Ct. 159 (1981); **United States v. Burreson**, 643 F.2d 1344, 1349 (9th Cir.), cert. denied 102 S.Ct. 125, 102 S.Ct. 165 (1981). This is because authenticity is merely an aspect of relevancy. Fed. R. Evid. 701 advisory committee note.

Although the trial court was correct in finding that neither Rule 901 nor 902(3) was complied with, the court did abuse its discretion in holding the evidence authentic and admissible. This circuit requires strict compliance with the authenticity rules. **Sandoval-Vera v. Immigration & Naturalization Service**, 667 F.2d 792, 793 (9th Cir. 1982); **Iran v. Immigration & Naturalization Service**,

656 F.2d 469 (9th Cir. 1981); **Chung Young Chew v. Boyd**, 309 F.2d 857, 866-67 (9th Cir. 1962).

In this case, the extrinsic evidence, consisting of the testimony of an INS agent, was not enough to sustain a finding of authenticity under 901(a). That testimony was not "sufficient to support a finding that the matter in question is what the proponent claims." Fed. R. Evid. 901(a). In addition, the requirements of 902(3) for self-authentication of foreign public documents were not met. [1/] The trial court was correct in its determination that the first requirement of 902(3) was not met; that requirement is that the document be executed or attested by a person who is acting in an official capacity and <u>who is authorized</u> by the laws of that

country to make the attestation or execution. The trial court was not satisfied that Herstig, who signed the documents, was properly authorized. We agree, since no evidence was presented as to the nature of Herstig's authority or position. 2/

The FRE offers generous opportunity to authenticate by presentation of sufficient evidence to support the authenticity of a document. Alternatively, if 902(3) is met the document is self-authenticating. But the rules offer no third means of authentication; certainly it is not enough that the documents present an "aura of authenticity." Thus, the trial court abused its discretion by admitting the unauthenticated documents into evidence.

III. HEARSAY OBJECTIONS

Appellant also claims that Exhibit 4 was admitted in violation of the prohibition against hearsay evidence in Fed. R. Evid. 802, since that exhibit is hearsay that does not fit within any of the exceptions to the prohibition provided in Rule 803. The trial court's decision to admit evidence over hearsay objections is reviewed under an abuse of discretion standard. United States v. Burreson, 643 F.2d at 1349.

A. THE PUBLIC RECORDS EXCEPTION, Fed. R. Evid. 803(8)

The public records exception to the rule against admission of hearsay evidence is found in Fed. R. Evid. 803(8), which states in part:

> Records, reports, statements or data compilations, in any form, of public offices or agencies, setting forth (A) the activities

> of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel . . . .

Because there is no indication that Herstig, the person who signed the conviction report (Exhibit 4) and the identification form (Exhibit 3), had first hand knowledge of the convictions and because of the probability of multiple levels of hearsay in this situation, Exhibit 4 does not fit within Rule 803(8). Fed. R. Evid. 803 advisory committee note; **United States v. Hudson**, 479 F.2d 251, 254-55 (9th Cir. 1972), cert. denied 414 U.S. 1012 (1973). It is apparent that Herstig, who signed the conviction report, did not act on the basis of first hand knowledge since the alleged convictions had occurred from 17

to 26 years earlier in a variety of different courts. Since there is no countervailing evidence that suggests that Herstig did possess first hand knowledge, the evidence cannot be admitted. Id. at 254-55.

In addition, there is no evidence of any duty on the part of Herstig or anyone else to record this information. It may have been prepared just for the INS request and not as part of any duty to record day to day. Fed. R. Evid. 803 (6), (8) advisory committee notes. [3/] This is another factor preventing us from finding the 803(8) exception helpful to the Government here. [4/]

B. THE JUDGMENT OF PREVIOUS CONVICTION EXCEPTION, Fed. R. Evid. 803(22)

Rule 803(22), which allows "evidence of a final judgment" to be used "to

prove any fact essential to sustain the judgment", was intended as a vehicle for proving underlying facts when a judgment of conviction is presented. [5/] Here, we have a situation where appellant would have the court stretch the rule to allow the fact of conviction itself to be proved by lesser evidence. The fact of a judgment of conviction is a prerequisite to the use of this rule, not the thing to be proved. Rule 803(22) will not serve the Government without introduction into evidence of the judgment of conviction. See **Lloyd v. American Export Lines**, 580 F.2d 1179, 1190 (3d Cir.), cert. denied 439 U.S. 969 (1978); J. Weinstein, **Weinstein's Evidence** ¶803 (22)[01] at 803-271, et seq.

C. THE RESIDUAL EXCEPTION, Fed. R. Evid. 803(24)

Rule 803(24) provides a residual exception for evidence which does not meet the requirements of any of the other exceptions, but which has equivalent circumstantial guarantees of trustworthiness and is more probative than any other evidence that the proponent can procure through reasonable efforts. The trial court did not address the issue of whether Exhibit 4 could be admitted under 803(24) [6/] because it admitted the document on other grounds. The issue is, however, raised on appeal. There is nothing indicating that Exhibit 4, when compared with other hearsay exceptions, has "equivalent circumstantial guarantees of trustworthiness." Fed. R. Evid. 803(24). In addition,

there is nothing in the record to indicate that through reasonable efforts the government could not procure more probative evidence such as the actual judgments of conviction. As a result, the evidence cannot be admitted under this exception.

IV. CONCLUSION

For the reasons discussed above the case is reversed. Because of our holdings on the authenticity and hearsay issues, we need not reach the confrontation clause claim. **Ashwander v. Tennessee Valley Authority**, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

REVERSED

FOOTNOTES

1) Fed. R. Evid. 902(3) reads:

Foreign public documents. A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be

> treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

2) The second requirement of 902(3) is also not met in this case since there was no final certification which attested the official position of Herstig. Since the documents were not properly attested and since no good cause was shown for the lack of final certification, the "good cause" exception of 902(3) is not met.

3) Nor does Exhibit 4 set forth the activities of the office or agency. Fed. R. Evid. 803 (8)(A).

4) The Government's argument that 18 U.S.C. § 3578 helps them is misleading at best. The statute makes clear that it is only copies of a conviction made and certified by a court which are prima

facie evidence. Such a certified record does not exist in this case.

5) The full text of Rule 803(22) reads:

> Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendre), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

6) Rule 803(24) reads:

> Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the

proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

UNITED STATES v. PERLMUTER
No. 81-1533

Filed: December 2, 1982
Phillip B. Winberry
Clerk, Court of Appeals

ANDERSON, Circuit Judge, specially concurring:

I concur only in the judgment. I consider the government's effort to be inadequate since it failed to take steps to obtain documents that complied with the Federal Rules of Evidence, nor determine if other documentation was available.

I would leave to another day any discussion of the "good cause" exception in Fed. R. Evid. 902(3) and "equivalent circumstantial guarantees of trustworthiness" in Fed. R. Evid. 803(24).

I CONCUR IN THE JUDGMENT.

United States v. Perlmuter
No. 81-1533

Filed: December 2, 1982
Phillip B. Winberry
Clerk, Court of Appeals

FERGUSON, Circuit Judge, concurring:

I concur in Judge Nelson's opinion for the reasons expressed. In addition, there are other reasons why the defendant's conviction must be reversed.

Government Exhibits 3 and 4 were the only evidence offered to prove that the defendant was convicted of crimes in Israel before entering this country. While the precise origin of these documents is unclear, they were obtained through Interpol. Interpol is a widely known international police organization. It is not an agency of the

Israeli Government and it certainly is no part of the government of this country. A record of convictions from Interpol has no more authority in the legal proceedings of the United States than records of alleged convictions that may be kept by Lloyd's of London for insurance purposes.

The documents are not signed by a person having either appropriate authority or official capacity. Both exhibits bear the signature "Herstig" above the words "Dept. of Automatic Data Processing." The identity of Herstig is never revealed, and his official position, employment by the Israeli Government and his authorization by that

government's law to make these attestations are never discussed.

Exhibit 4 can best be described as a police report of conviction on a "rap sheet." Such documents have never been allowed as evidence of a conviction arising from an American court proceeding, and therefore certainly cannot be used to prove convictions in a foreign nation.

In order for a federal prosecutor to prove the fact of conviction of a person in a state court, he must comply with 28 U.S.C. § 1738, [1/] which requires that records of court proceedings of the states be authenticated by attestation of the court clerk and the certification of a judge of the court. In Clainos v. United States , 163 F.2d 593 (D.C.

Cir. 1947), the court held that a record of convictions made by a police agency is not admissible as evidence of those convictions. That court pointed out that while rap sheets may be useful to the police in their law enforcement capacity, the record of convictions for the purposes of a court must come from a court itself in order to be considered reliable. Id. at 596.

In United States v. Scott, 592 F.2d 1139 (10th Cir. 1979), the court held that a federal prosecutor may use a rap sheet to cross-examine a witness regarding prior convictions, but it clearly stated that such a document is not admissible as a public record of the convictions. Id. at 1143. Rap sheets are not

based on first-hand knowledge of the matters being recorded; only the court where the conviction occurred has such knowledge.

What is required of American police and courts must be required of foreign police and courts. The reliability accorded foreign police records in our courts cannot be greater than that accorded the police records of this country.

FOOTNOTE

1. Section 1738 states:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.